(3)

No. 86-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

RICHARD B. CAIFANO
188 West Randolph Street
Suite 626
Chicago, Illinois 60601
(312) 346-0570
Attorney for Petitioner

Of Counsel:
MELVIN B. LEWIS

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

1. The Appeals' Court Failure To Grant Mandatory Review Of Petitioner's Sentence.

A. *The Continuing Importance of The Issue* (cf. U.S. Br. p. 7).

It is difficult for petitioner to accept the government's suggestion that this Court should tolerate a continuing injustice against one individual if it is offered the assurance that that same injustice will not be visited upon any other individuals.

However, it is noted that the repeal of enhanced sentencing under Section 3575 of Title 18 U.S. Code is prospective and does not become effective until November 1, 1987. Courts of review will continue to address challenges to sentences imposed under that provision for some time.

Therefore, the concept of enhanced sentencing for special dangerous offenders continues as a part of our current law; see also, Title 21 U.S. Code Section 849, "Dangerous Special Drug Offender Sentencing". The government's contention that petitioner's due process violation claims raise no issue of continuing importance is simply untenable.

B. *Sufficiency of Prior Appellate Review.*

The DSO statute mandates that the court of appeals "shall state in writing the reason for its disposition of the review of the sentence" (18 U.S.C. 3576). The government now argues that this duty was performed by the inclusion within the opinion of the following sentence:

> "We have considered appellant's other claims of reversible error and find them without merit."

With all due respect, we urge that the quoted stock assertion is, as applied to Section 3576's mandated statement of "the reason for" such a conclusion, evasion rather than discharge of the statutory requirement.

On direct appeal of petitioner's conviction, the Court of Appeals concluded, quite simply:

> "Because we find that the government's cross-examination of appellant and its bolstering of its chief witness did not constitute reversible error, appellant's conviction is affirmed" (Br. 11a).

While it is true that a footnoted reference of the opinion recognizes petitioner's request that the DSO sentence be set aside on constitutional grounds, the court did not consider petitioner's contentions, it merely acknowledged that the contentions had been presented.

If the court's language be given the conclusive and broad effect assigned by the government, it compels the absurd result that an improper sentence enhancement is appropriate where there is no improper cross examination of a defendant or bolstering of government witnesses.

Without the benefit of supporting authority, the government concludes that the Court of Appeals' failure to state in writing its reasons for affirming the DSO sentence does not rise to the level of a due process violation. This Court has ruled that where a protected liberty interest is created by statute, the failure to satisfy the express provisions of the law granting procedural safeguards to the individual possessed of the liberty interest constitutes a violation of due process. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones,* 445 U.S. 480 (1980). There can be no question that enhanced sentencing under the DSO Act presents a serious liberty interest to petitioner. It is equally certain that Section 3576 establishes the procedural requirement of broad appellate review of any sentence so imposed with the additional mandate that the reviewing court state in writing its reasons for the disposition of the sentence reviewed, in order to promote uniformity and preclude idiosyncratic application.

Due process is afforded to petitioners and others whose sentences have been so enhanced. A simple footnoted reference to the fact that an attack has been made upon the sentence fails to comply with the minimum standards for due process established by this Court as mandated by statute.

2. Ineffective Assistance Of Counsel.

A. *Evidence Barred by The Doctrine of Collateral Estoppel* (cf. U.S. Br. 10).

With respect to petitioner's claim of violation of the Doctrine of Collateral Estoppel, the government makes two claims:

1. that no violation occurred; and
2. that any error was harmless.

The government's contention that no violation occurred is bottomed on its assertion that the evidence was introduced "not to show that the petitioner transported the shares to Texas or caused them to be transported, but for the legitimate purpose of proving the existence and nature of the conspiracy." (Br. p. 11). This quite literally is a distinction without a difference. It never had been suggested by anyone that petitioner had personally traveled from Florida to Texas or, indeed, that he ever had been in either State. His liability in that respect was always assigned as vicarious; and in fact, the jury at the first trial acquitted him of that charge after receiving an instruction which recited:

> "The guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of any other person as his agent, or by acting in concert with or under the direction of, another person or persons in a joint effort or enterprise.
>
> "Title 18 U.S. Code, Section 2 provides:
>
> > 'Whoever commits an offense against the United States, or aids, abets, counsels, commands or procures its commission, is punishable as a principal'

> "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal. So, if the acts or conduct of an agent, employee or other associate of the defendant are wilfully directed or authorized by him or if the defendant aids and abets another person by wilfully joining together with such person in the commission of a crime then the law holds the defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself." (R. proceedings before Judge Paine, February 14, 1980 in *United States v. Marshall Caifano*).

It follows therefore that in this case there functionally is no difference between the vicarious liability sought to be asserted against the petitioner for the act of transportation and the vicarious liability sought to be asserted against him on the theory of conspiracy to transport. The proofs are identical. The charge itself is essentially identical in this application, because there is no question but that the shares were in fact transported to Texas by the alleged co-conspirator. The petitioner, who had been found not guilty of causing the shares to be transported to Texas, could not rationally be prosecuted for conspiring to cause that transportation.

In the context of this case, the concept of a conspirator in the transportation of the securities from Florida to Texas, who in no way caused those securities to be transported, is a contradiction in terms.

With respect to the alleged harmlessness of the evidence, the government points out that only two witnesses mentioned the matter. These, however, were the only two witnesses who could have provided such testimony. And, because Pemberton, the key witness in that respect—the active transporter—had never seen petitioner, the evi-

dence that he had transported shares to Texas where he sought to sell them and evidence that shares had been seized from him upon his arrest in Texas provided significant collateral support to the story of the *only* witness against petitioner, Alva Rodgers.[1] It is impossible to conclude that without Pemberton's testimony the jury would have convicted petitioner.

The first jury did not find the petitioner guilty of anything. It is therefore impossible to say that the evidence against him was sufficient to render harmless the type of collateral support dispensed in the second trial by evidence of the Florida-to-Texas transaction.

The impropriety of that evidence, however, cannot reasonably be considered apart from the woeful failure of professional assistance by trial counsel's failure to have objected to it. As in the case of the detailed references to petitioner's prior convictions, the evidence was not only harmful in itself but emblematic of substantial neglect of trial counsel to provide the level of assistance mandated by the Sixth Amendment.

B. *Prior Convictions* (cf. U.S. Br. 13).

Petitioner's trial lawyer introduced evidence of petitioner's prior convictions and incarceration in excruciating detail, far beyond anything which the government would have been allowed to elicit for impeachment purposes. That was done without any prior attempt to invoke the

[1] At trial, government counsel conceded that, ". . . Mr. Caifano's dealings were with Mr. Rodgers and there is no evidence that the government presented nor do we claim that Mr. Caifano had any dealings with Mr. Pemberton." (R. 15, pp. 369-70); and, "In this case it is clear in the cross examination by Mr. Varon (trial counsel for petitioner) that the only witness that implicated defendant is Rodgers" (R. 16, p. 496).

court's discretion [under Rule 609(a)] with respect to those convictions, nor to make the point that the sentence on the earlier conviction had in fact been completed more than ten years prior to the date of trial.[2]

That performance cannot be justified as a tactical selection of an appropriate response to the government's case. The government argues that its evidence of petitioner's prior incarceration was merely a harmless inadvertent slip on the part of the witness Rodgers, which was overcome by the withdrawal of that question. How then may defense counsel's detailed questioning of petitioner regarding his prior incarceration be justified as a reasonable response to that evidence (R. 15, pp. 375-77).

The record in this case is studded with repeated instances of errors and omissions on the part of trial counsel that may not be rationalized or excused. The evidence that was elicited by the shortcomings of counsel adversely affecting substantial rights of the petitioner to a fair trial.

Respectfully submitted,

RICHARD B. CAIFANO

Attorney for Petitioner

Of Counsel:
MELVIN B. LEWIS

---

[2] The government claims that the petitioner had been released nearly 8 years before trial. However, for two of those years, one sentence had been fully served. Petitioner was then serving a second consecutive sentence imposed in a different case, service of which was completed in December, 1972. At best, therefore, the government would have been permitted to introduce evidence of only one of those convictions. Since the other had expired more than ten years before trial. See, *United States v. Cavender*, 578 F.2d 531 (5th Cir. 1978).